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Regulations

VA Issues Proposed Rule to Reform Competition Requirements

On February 1, 2019, the U.S. Department of Veterans Affairs (VA) issued a [proposed rule](#) to revise VA Acquisition Regulation (VAAR) Part 806, Competition Requirements. The proposed changes are a continuation of the VA's phased approach to streamline the VAAR to eliminate duplication with the Federal Acquisition Regulation (FAR); transition internal guidance into the VA Acquisition Manual (VAAM); and incorporate new department-specific policies. Previously, in September 2018, the VA issued several proposed and final rules addressing such topics as Construction and Architect-Engineer Contracts; Contracting by Negotiation and Service Contracting; Contract Cost Principles and Procedures; Protests, Disputes and Appeals; and Subcontracting Policies and Procedures.

In this latest round of proposed revisions, the VA seeks to add the following new sections to VAAR Part 806, Competition Requirements:

- Section 806.270 (Set-asides for Verified Veteran-owned Small Businesses), which sets forth the VA's authority to set aside procurements for veteran-owned small businesses (VOSBs) when the VA "Rule of Two" is met. That is, when the contracting officer reasonably expects to receive two or more offers from eligible VOSBs or Service-disabled, veteran-owned small businesses (SDVOSBs), and the award can be made at a fair and reasonable price. This section also provides that the VOSB set-aside requirement applies to all contracts subject to VAAR Part 806. Furthermore, SDVOSB- and VOSB-restricted set-asides involving indefinite-delivery contracts will satisfy competition requirements.
- Section 806.302-750 (Noncompetitive Procedures for Verified VOSBs), which authorizes contracting officers to enter into contracts non-competitively with SDVOSBs and VOSBs verified under the VA Vets First Verification Program. Specifically, this permits the use of other than full and open competition procedures for contracts at or below the Simplified Acquisition Threshold (SAT).
- Section 806.302-751 (Authorized or Required by Statute – VA Unique Authorities), which lists those statutes previously contained in Section 806.302-5. This section also provides pertinent VA policy regarding the use of other than full and open competition for the acquisition of prosthetic appliances and services as well as commercial healthcare resources and use of medical equipment or space when acquired from affiliated and unaffiliated institutions.

Comments on the proposed rule are due by April 2, 2019.

GSA Issues Final Rule to Repeal Small Business Mentor-Protégé Program

On February 4, 2019, the General Services Administration (GSA) issued a [direct final rule](#) to amend the GSA Acquisition Regulation (GSAR) to remove GSA's Mentor-Protégé Program and associated clauses that duplicate the Small Business Administration's government-wide Mentor-Protégé program. This is in response to a 2016 SBA [final rule](#) that established the government-wide program for all small business concerns, and that also



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implemented the National Defense Authorization Act (NDAA) 2013, Section 1641, which prohibited an agency from administering an agency-specific, small business mentor-protégé program without SBA approval. This direct final rule, effective April 3, 2019, removes GSAR Subpart 519.70 and transitions contractors involved in existing mentor-protégé agreements to the SBA government-wide program.

DoD Issues Proposed Rule to Reform Undefined Contract Actions

On February 15, 2019, the Department of Defense (DoD) issued a [proposed rule](#) to amend the DFARS to implement Sections 811 and 815 from the 2017 and 2018 NDAA, respectively, that modify requirements for definitizing Undefined Contract Actions (UCAs). The proposed modifications impact risk-based profit calculations, definitization timelines, foreign military sales, and unilateral UCA definitizations exceeding \$50 million.

UCAs are designed for use when urgent Government interests demand the contractor be given a binding commitment to permit immediate contract performance, despite the inability to negotiate contract terms and conditions in sufficient time. The UCA represents a general framework, rather than a complete contract; the parties agree to definitize the contract within a defined time period, generally no later than 180 days of the UCA award date.

The proposed rule makes the following much needed, but modest amendments to the DFARS:

- For definitizations delayed beyond 180 days from the date the contractor submits a “qualifying proposal,” profit must be calculated based upon the contractor’s cost risk that existed on the proposal submission date of the proposal submission, rather than the definitization date.
- Contracting officers must obtain written, higher-level approval to extend UCA definitization more than 90 days beyond the maximum 180-day definitization period.
- Foreign Military Sale UCAs require definitization within 180 days of the contracting activity approval; the agency head may waive this requirement for certain operations.
- DoD cannot unilaterally definitize UCAs exceeding \$50 million without fulfilling certain new, restrictive requirements, such as obtaining higher-level written approval and allowing statutory deadlines to elapse.
- “Qualifying proposal” is redefined to align with the statutory requirement that proposals include sufficient information to enable a “meaningful audit” versus a “complete and meaningful audit.”

Comments on the proposed rule are due by April 16, 2019.

DoD Issues Final Rule Requiring Contractor Anti-Terrorism Awareness Training

On February 15, 2019, DoD issued a [final rule](#) to require federal contractors who routinely access federally-controlled facilities and military installations to complete Level I anti-terrorism awareness training. This rule creates a new DFARS Subpart 204.72 (Antiterrorism Awareness Training), which prescribes a new DFARS clause 252.204-7004 (Antiterrorism Awareness Training for Contractors), for use in all solicitations and contracts, including those below the simplified acquisition threshold (SAT) and those for commercial item acquisitions. The new training is to be completed within thirty days of requiring access and annually thereafter. The burden on contractor personnel is expected to be minimal, as the training can be web-based and the DoD bears the burden of the training expense. See 84 Fed. Reg. 4362, Feb. 15, 2019.

DoD Issues Final Rule Regarding Amendments Related to General Solicitations

On February 15, 2019, DoD issued a [final rule](#) to implement Sections 221 and 861 of the 2018 NDAA which “expand the definition of ‘other competitive procedures’ and extend the term and increase the dollar value under the contract authority for advanced development of initial or additional prototype units.”

Section 221 broadens the application of other competitive procedures by amending 10 U.S.C. § 2302(2)(B) to encompass “science and technology” proposals, rather than simply “basic research” proposals. In addition, Section 221 establishes broad agency announcements (BAAs) as a competitive procedure for the selection of science and technology proposals. Section 861 amends 10 U.S.C. § 2302(e) as it applies to “advanced development of initial or additional prototype units awarded from a competitive selection.” Specifically, this extends the statutory term limits from twelve months to two years, and increases the dollar threshold from \$20 million to \$100 million.

DoD Issues Final Rule to Encourage Use of Commercial or Non-Government Standards

On February 15, 2019, DoD issued [a final rule](#) to implement Section 875(c) of the 2017 NDAA, which requires DFARS revisions “to encourage offerors to propose commercial or non-Government standards and industry-wide practices that meet the intent of military or Government-unique specifications and standards.”

This rule amends DFARS 211.107(b) to require the use of FAR provision 52.211-7 (Alternatives to Government-Unique Standards) in solicitations that include military or Government-unique specifications and standards. Previously, use of this provision was optional in DoD solicitations. Acquisitions valued at or below the SAT are included in this requirement. DoD solicitations for commercial item acquisition, however, are excluded, as such contracts should not include military or Government-unique specifications or standards. Affected contractors who choose to propose alternative standards should remember that the offeror retains responsibility to demonstrate how said alternative standards meet DoD mission requirements.

DoD Issues Final Rule to DFARS: Extension of Supply Chain Risk Management Authority

On February 15, 2019, DoD issued a [final rule](#) to implement Section 881 of the 2019 NDAA, which made the DFARS 239.73 requirements for supply chain risk management permanent by removing the sunset provision of the existing regulation, and instead establishing authority under 10 U.S.C. § 2239a.

The implementation of this DFARS rule, along with a prior DFARS Class Deviation, strongly hints at DoD’s increased efforts to regulate and evaluate supply chain risk management. Contractors face significant responsibility in managing, minimizing, and mitigating any perceived risks, lest contracting officers interpret failure to do so as a negative mark when evaluating contractor past performance.

DoD Issues Final Rule Permitting more than Five Offerors for Phase Two Design-Build Solicitations

On February 15, 2019, DoD issued a [final rule](#) to implement Section 823 of the 2018 NDAA, which amends 10 U.S.C. § 2305a to grant the contracting officer discretion to exceed the five-offeror maximum for certain phase two design-build solicitations. For such solicitations issued pursuant to an indefinite-delivery, indefinite-quantity (IDIQ) contract that exceeds \$4 million, the contracting officer may select more than five offerors to submit competitive proposals without requiring the head of the contracting activity’s approval. The contracting officer has discretion in the number of offerors selected when the solicitation is for a contract valued at or below \$4 million; this is consistent with existing FAR guidelines. A new DFARS section 236.303-1 implements this new authority for contracting officers.

DoD Issues Final Rule to Streamline "Transportation of Supplies by Sea" Clause

On February 15, 2019, DoD issued a [final rule](#) to consolidate existing instructions regarding notifications of transportation of supplies by sea into a single DFARS clause, 252.247-7023.

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